

# In the EU, it's the Rule of Law. In Poland, it's Unconstitutional?

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The Polish Minister of Justice Zbigniew Ziobro, in his capacity as Prosecutor General, [wants to apply to the Polish Constitutional Tribunal](#) to have the EU regulation connecting the rule of law with the suspension of EU funds declared inconsistent with the Polish constitution. Why is the member of a government that has recently consented to adopting the regulation, now going to fight it? And are there any grounds for doing so?

The motion refers to the EU regulation on the possibility to suspend funding for a member state that fails to comply with the rule of law (*Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget*). This regulation was finally (yet with some difficulty) adopted in December 2020 and is accompanied by [extensive guidelines](#) on how and when the regulation may be applied.

## The EU law perspective

From the point of view of EU law the situation is unambiguous. The regulation on conditionality, after its entry into force, will apply to all Member States in full, starting from 1 January 2021. It may cease to be effective by way of either repealing legislation or annulment by the Court of Justice (CJEU). In this respect, the government agencies may use the possibility to bring an action for annulment of the EU legislative act (Article 263 TFEU). From the perspective of a Member State's government this is the only possible way of challenging the validity and effectiveness of the Conditionality Regulation in the territory of Poland.

In particular, it is not possible to challenge the validity or effectiveness of such a legislative act before a Member State's constitutional tribunal. Already since the judgment *Internationale Handelsgesellschaft* (11/70), the Court of Justice has been of the opinion that EU legislative act's "validity (...) or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of its constitutional structure". Any reservations as to the consistence of an EU regulation with fundamental rights, including those provided for in the Charter of Fundamental Rights, or with the Treaty based on which it has been issued, may be considered exclusively by the CJEU. In such a case, a national court, including the Constitutional Tribunal, would have to refer a question for preliminary ruling to the CJEU with regard to the regulation's validity in light of the guarantees set out in EU law (and analogous to those set out in the national constitution). However, this

way of challenging the validity of a regulation is not available to the Member State's bodies that could have brought an action for annulment under Article 263 TFEU.

## **The national law perspective**

On the national side, the Prosecutor General may file with the Constitutional Tribunal an application for examining the constitutionality of an act of Parliament or an international agreement (Article 191(1) in conjunction with Article 188(1) of the Constitution). An EU regulation is a law that is established by an international organization and, in the light of the Constitution, is neither an act of Parliament nor an international agreement.

The Polish Constitutional Tribunal has already examined an EU regulation (case file no. SK 45/09). However, this has been done under the constitutional complaint procedure which gives the possibility to examine not only acts of Parliament but also other "normative acts" (Article 79 of the Constitution). The Constitutional Tribunal has considered the EU regulation to be such a normative act. The examination of a regulation under the complaint procedure is, however, subject to numerous restrictions that emphasize the extraordinary nature of such examination.

It should be emphasized that such examination is, in principle, still contrary to EU law since national courts' judgments may not restrict the effective application of regulations that are valid and binding in the Union regulation system.

The consequences of such a ruling by the Constitutional Tribunal would also be questionable. A consequence of a ruling on a legislative act's inconsistency with the Constitution should be the loss of the act's binding force. The CT has no powers to derogate or annul EU regulations, either under the Constitution or the EU law. In the case no. SK 45/09 the CT pointed, solely for the purposes of the constitutional complaint, to the act's possible lack of effect in the territory of Poland. However, in the light of EU law, such a ruling would not impact the validity or effectiveness of the EU regulation, according to the case law of the Court of Justice. National bodies should therefore continue to apply the regulation. Otherwise, they would expose Poland to the risk of a complaint brought by the Commission under Article 258 TFEU.

The conclusion is clear: as long as the EU regulation remains valid and effective at the EU level, EU institutions (the Commission and the EU Council) may apply it with regard to Poland. Of course, it cannot be ruled out that in the future we shall face a surprising judgment of the Constitutional Tribunal finding, as a result of the Prosecutor General's application, that the EU regulation's compliance with the Constitution may be subject to review contrary to its literal wording. However, this will not protect Poland or its citizens against the consequences of violating the rule of law, as provided for in the regulation, i.e. the suspension of EU funding for projects implemented in Poland.

In this respect, the regulation's applicability is in no way dependent on actions of national government bodies or on judgments of domestic courts. Moreover, in the

event of a suspension of EU funding, the member state concerned is required to make up, by itself and from its own public budget, for the missing EU funds (Article 5(2) of the Regulation) so that the funding beneficiaries do not suffer the effects of the suspension. Therefore, a possible judgment of the Constitutional Tribunal will not help the member state in any way if the Commission brings to the CJ a complaint regarding the evasion of the obligations under EU law.

## The political perspective

Therefore, in the absence of any legal sense, the application seems to have a political motive behind it.

Firstly, this way the Minister of Justice wants to mobilize the ruling coalition, of which he is a part himself, to oppose the EU actions regarding the rule of law. He has done this before by opposing Polish Prime Minister Mateusz Morawiecki quite strongly. At that time, he suggested that the Prime Minister would be considered “a gutless wonder” [in Polish “mi#kiszon”] (whatever this was supposed to mean) if he would not veto the EU budget in connection with the planned adoption of the rule of law regulation.

Secondly, while it is clear that the Prosecutor General's actions cannot block the entry into force of the regulation, or lead to its derogation or limitation of effectiveness by the national Constitutional Tribunal, not all decisions regarding the EU budget package and the Recovery Fund have yet been taken. Note should be taken of the fact that the Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union still requires ratification by all EU Member States. And this is an important element of the so-called Recovery Fund (Next Generation EU). In this respect, the mobilization of a part of the ruling coalition, taking place as a result of the Constitutional Tribunal's controversial judgment regarding the regulation on the rule of law, could be a motivation for blocking the ratification process in Poland by the ruling majority, even at the cost of serious political disturbances at the EU level.

It is therefore self-evident that the Prosecutor General, responsible for developing and implementing “judicial reforms” in Poland, is afraid that they will be considered a violation of the rule of law in the light of the new regulation on conditionality. And here, I am afraid, it is impossible to disagree with the Public Prosecutor General. This is confirmed, primarily, by the following: the Commission application under Article 7(1) TEU, pending before the EU Council; the numerous proceedings conducted by the Commission under Article 258 TFEU with regard to the threats to the judiciary's independence in Poland, and the numerous references for a preliminary ruling from Polish courts, pending before the Court of Justice of the EU and relating to the issue in question. I believe that these cases, when resolved, will demonstrate the true “Emperor's New Clothes” as in the J. C. Andersen's tale.